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In the Supreme Court of the United States

OCTOBER TERM 1949

No. 191

JOSEPH B. COOPER & SON, INC., AS OWNER OF 84.80 OUNCES OF PLATINUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The Opinion-Order of the United States District Court for the Southern District of Florida (R. 467–468) is not reported. The majority and dissenting opinions of the United States Court of Appeals for the Fifth Circuit (R. 479–487) are reported at 174 F. 2d 619.

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1949 (R. 488). The petition for a writ of certiorari was filed on July 14, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether both courts below correctly concluded that the facts of this case disclosed an illegal subterfuge designed to evade the wartime prohibition against exportation of platinum without a special license.

2. Whether the provision for forfeiture where "an attempt is made to export or ship from or take out of the United States any * * * articles, in violation of law" (Act of June 15, 1917, Title VI, Sec. 1, as amended (40 Stat 223; 46 Stat. 740, 22 U. S. C. 401), *infra,* pp. 11–12) applied to property attempted to be exported in violation of the Act of July 2, 1940, Sec. 6, 54 Stat. 714 (*infra,* p. 11).

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations relating to export control are set forth in the Appendix, *infra,* pp. 11–13.

STATEMENT

Petitioner, a New York corporation engaged in smelting and refining precious metals and dealing in jewelry "findings" (parts for furnished pieces of jewelry), appeared as claimant in this libel for the forfeiture of a shipment of platinum "rings" which the Government claimed petitioner had sought to export illegally (R. 5–8, 153, 162–163). The details of the shipment in controversy and pertinent events leading thereto are as follows:

Throughout the period in question, export control regulations prohibited the unlicensed exportation of platinum to Brazil. Platinum jewelry was excepted from this prohibition and could be exported to Brazil without a special license (see Appendix, *infra,* pp. 12–13). In May and June of 1941, in response to orders received from one Dr. Estrin, son-in-law of petitioner's president, Joseph B. Cooper, petitioner applied unsuccessfully for licenses to export platinum bars to Brazil (R. 226–228, 248). Some two or three months after being notified that these licenses could not be procured, Dr. Estrin wrote asking that platinum rings be sent him (R. 228). In late 1941 or early 1942, in response to Dr. Estrin's request, petitioner made one or more shipments to Brazil of pure platinum rings similar to those involved in this case (R. 229–233, 467). No licenses were sought or obtained for these shipments, but they were successfully passed through customs (R. 232).

Then, in March, 1942, petitioner made the shipment involved here (R. 1, 5). As it had done with the prior shipments (R. 231) petitioner delivered this one to the Railway Express Agency in New York. The goods were to be transported to Miami, Florida, thence by air to Rio de Janeiro, Brazil (R. 1, 5). Either Railway Express or Pan American International Air Express Service was responsible for clearing the shipment through the Collector of Customs at Miami (R.

1, 5). On or about March 25, 1942, the shipment was presented for clearance at Miami; clearance was refused, and the goods were seized and detained by the Collector of Customs (R. 6).

On June 1, 1942, this libel was brought under the Act of June 15, 1917, Title VI, Sec. 4, 40 Stat. 224, as amended by the Act of March 1, 1929, 45 Stat. 1423–1424, 22 U. S. C. 404, for forfeiture and condemnation of the seized shipment (R. 1–5). Petitioner answered on June 20, 1942, opposing forfeiture and praying restoration of the property to it (R. 5–8). At the trial in the district court, beginning on June 27, 1947, a number of witnesses were examined and depositions taken by the Government in New York City and Rio de Janeiro were introduced.

It was not disputed that the so-called rings in controversy were made of pure platinum (R. 467). Several expert witnesses testified that platinum, a soft metal, is never or practically never used unalloyed in the manufacture of rings (*e. g.*, R. 67–69, 79, 110–111, 137, 269–271, 280). Further expert testimony established that the rings here involved were, for the most part, very heavy, crudely fabricated, of extremely dubious salability (R. 82–87, 268–269, 273–275, 280, 304–305, 315). Brazilian jewelers testified in depositions that there was no market for pure platinum rings in the area for which this shipment was intended (R. 121–122, 376, 410–411, 447–448). There was proof that this shipment was made, at least in part, to

fill an order procured by Dr. Estrin for platinum in bars rather than rings, and the district court so found (R. 139–146, 467–468). The district court also concluded from the evidence before it (*e. g.*, R. 222–223) that Dr. Estrin was acting as petitioner's agent in this transaction (R. 468).[1]

Rendering a judgment decreeing forfeiture, the district court held that the shipment in question had been an attempted violation of the ban on exportation of platinum (R. 467). This judgment was affirmed by the Court of Appeals (one judge dissenting) which, having the seized goods physically before it, concurred in the district court's conclusion that the bulk of them "were logically never intended for commercial use as jewelry" (R. 484).

ARGUMENT

Fundamentally, the problem facing the District Court in this case was a factual determination as to whether the events outlined above constituted an attempt to export platinum in violation of export control regulations through the use of a

[1] Although petitioner's president, Joseph B. Cooper, denied this agency (R. 222), he also testified that his son, the corporation's vice-president and secretary, had been almost wholly responsible for the handling of this matter (R. 229). And the Government produced a document, prepared by the son, expressly describing Dr. Estrin as agent of the corporation (R. 222–223). Unfortunately, this exhibit and others which would doubtless add clarity to evidentiary details referred to in the petition for certiorari as well as herein have not been made a part of the record before this Court by the petitioner.

subterfuge designed to simulate compliance with an exception in those regulations. The resolution of this question against the petitioner, concurred in by both courts below, is, we submit, entirely warranted by the record before this Court (see pp. 3–5, *supra*), and presents no basis for further review here.

1. Petitioner argues, however, that the contents of the seized shipment could "objectively" be described as "rings"; that this brought them within the regulations' exemption for "jewelry"; that it was error, therefore, for the courts below to base their judgments on the fact that the temporary form of these goods was but a stage in a scheme to transport pure, unfabricated platinum from this country to Brazil (Pet. 32–42). It would seem a sufficient answer to this contention that the courts below, guided by the convincing testimony of experienced jewelers and by their own physical inspection of the "rings" in controversy, concluded in effect that most of these crudely fabricated articles were not intended to be commercially usable as "jewelry" within the evident meaning of the controlling regulations (R. 468, 484).

But this is not to suggest that petitioner would stand in any better position had its artifice been less inept. The "objective" examination of the seized shipment for which petitioner pleads would entail stripping this case of every circumstance which gives it meaning. It is scarcely necessary

to recall that the Act of July 2, 1940, *infra*, p. 11, which was passed in "days of fear and stress for us, as well as for our later allies,"[2] and under which the regulations in question were promulgated, was part of a vital scheme for achieving some measure of economic preparedness for the war which was then threatened and which was soon to materialize. See *United States* v. *One 1940 Dodge Truck*, 165 F. 2d 211, 212 (C. A. 5); *United States* v. *251 Ladies Dresses*, 53 F. Supp. 772, 773 (S. D. Tex.). The strategic importance of platinum for war purposes was well known,[3] and "reputable dealers in such metals took unusual precautions to prevent them from being exported unlawfully * * *." *United States* v. *Kertess*, 139 F. 2d 923, 929, fn. 5 (C. A. 2), certiorari denied, 321 U. S. 795. In the face of these facts, petitioner now suggests that this case ought to turn on the question whether the condemned platinum could be regarded as "jewelry," ignoring everything that led to its shipment and all that was intended to follow.

We submit that the facts found and the plain language of the statutes enforced below do not justify such a technical resolution of the controversy. No elaborate discussion is necessary to show that the exception for jewelry in the regula-

[2] *United States* v. *Rosenberg*, 150 F. 2d 788, 790 (C. A. 2), certiorari denied, 326 U. S. 752.

[3] See Spiegel, *The Economics of Total War* (1942), pp. 254–255, 293.

tions under discussion was intended to soften the impact of the national emergency on the *bona fide* jewelry trade, not to provide a path for evasion. Nor is this the first case in which federal courts have found it necessary to pierce a superficial veil of legality to disclose an attempt to violate export restrictions. Cf. *United States* v. *67,200 Pounds Lithopone,* 54 F. Supp. 895 (S. D. Tex.); *United States* v. *One Cadillac, Five-Passenger Coupe,* 54 F. Supp. 895 (S. D. Tex.). Long ago, this Court affirmed the principle that "a fraud upon a statute, is a violation of the statute." *United States Bank* v. *Owens,* 2 Pet. 527, 536. That principle has operated since to prevent statutory interpretation designed to foster hypertechnical evasion. Cf. *Gregory* v. *Helvering,* 293 U. S. 465; *Austin* v. *Tennessee,* 179 U. S. 343, 359–361. It is precisely applicable here.

2. Relying upon wholly irrelevant cases, petitioner contends (Pet. 57–58) that forfeiture under Section 1 of the Espionage Act of 1917, as amended, *infra,* pp. 11–12, is not applicable to attempted exports in violation of the Act of July 2, 1940 (*infra,* p. 11). The 1917 Act provides that where "an attempt is made to export or ship from or take out of the United States any * * * articles, in violation of law," and where "upon due inquiry as hereinafter provided, the property shall appear to have been about to be * * * unlawfully exported," such property "shall be forfeited to the United States." This

statute, enacted during World War I, was aimed at attempts to export similar to the one involved here, and is, therefore, squarely applicable to attempted violations of the Act of July 2, 1940. It has been so applied consistently by the federal courts. *United States* v. *One 1940 Dodge Truck,* 165 F. 2d 211 (C. A. 5); *United States* v. *Morachis,* 154 F. 2d 918 (C. A. 9); *United States* v. *21 Pounds, 8 Ounces, of Platinum,* 147 F. 2d 78 (C. A. 4). Petitioner, we submit, presents no serious ground which would support a contrary construction of the statute.

3. Petitioner's argument (Pet. 22–30) that there was no "attempt * * * to export or ship from or take out of the United States" the seized platinum "in violation of law" hardly seems to merit extended discussion. Petitioner had admittedly done everything it could to accomplish such exportation. Only seizure by customs officials when the shipment was in the hands of the carrier prevented the completion of an illegal export. Clearly, at the time of this seizure, the goods were "about to be * * * unlawfully exported." Prior shipments with which petitioner had done no more had successfully found their way to Brazil (R. 229–233, 467). As a customs officer testified at the trial (R. 64), limited personnel made thorough examination of every offered export an impossibility. Inevitably some illegal exports would escape detection, especially where, as here, they masqueraded in a guise

of legality. In expectable circumstances such as these, other cases implicitly recognize the seemingly obvious proposition that presentation to customs officials cannot be regarded as curing any illegality in an attempted export. *United States* v. *67,200 Pounds Lithopone, supra; United States* v. *One Cadillac, Five-Passenger Coupé, supra.*

CONCLUSION

The decision below, resting essentially on factual determinations, is correct, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1949.

APPENDIX

1. The pertinent part of the Act of July 2, 1940, 54 Stat. 712, 714, provided:[1]

> SEC. 6. Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in the prohibition or curtailment contained therein. In case of the violation of any provision of any proclamation, or of any rule or regulation, issued hereunder, such violator or violators, upon conviction, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or by both such fine and imprisonment. The authority granted in this section shall terminate June 30, 1942, unless the Congress shall otherwise provide.

2. The pertinent part of the Espionage Act of June 15, 1917, Title VI, as amended (40 Stat. 223; 46 Stat. 740, 22 U. S. C. 401) provides:

> SECTION 1. Whenever an attempt is made to export or ship from or take out of the

[1] This statute, with amendments, has been extended several times, most recently by Pub. L. No. 11, 81st Cong., 1st Sess., Feb. 26, 1949.

United States any arms or munitions of war, or other articles, in violation of law, or whenever there shall be known or probable cause to believe that any such arms or munitions of war, or other articles, are being or are intended to be exported, or shipped from, or taken out of the United States, in violation of law, the several collectors, comptrollers of customs, surveyors, inspectors of customs, and marshals, and deputy marshals of the United States, and every other person duly authorized for the purpose by the President, may seize and detain any articles or munitions of war about to be exported or shipped from, or taken out of the United States, in violation of law, and the vessels or vehicles containing the same, and retain possession thereof until released or disposed of as hereinafter directed. If upon due inquiry as hereinafter provided, the property seized shall appear to have been about to be so unlawfully exported, shipped from, or taken out of the United States, the same shall be forfeited to the United States.

3. Comprehensive Export Control Schedule No. 6 (for March–April 1942), issued by the Board of Economic Warfare pursuant to the Act of July 2, 1940, listed (p. 53) among the items requiring a special license for exportation to Brazil

PLATINUM GROUP METALS

* * * * *

Platinum metal and alloys in bars, ingots, sheets, slabs, wire, sponge, and other forms, including scrap.

Platinum metal and alloys in manufactures other than jewelry (including crucibles).

Page 35 of this Schedule contained the following listing and announced a general license for exportation of the listed items to "Group K" countries, which included Brazil (see pp. 70–71):

JEWELRY

Jewelry & other articles of solid gold or platinum to be worn or carried about the person (including men's jewelry, women's jewelry, cigarette cases, pocket cigar and cigarette lighters, compacts, powder & vanity)

* * * * *

Jewelry findings, parts & materials (specify by name).

U. S. GOVERNMENT PRINTING OFFICE: 1949